In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-45

THE WILSON BUILDING, INC., PETITIONER

v.

PETER J. BRENNAN, SCRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a-16a) is not yet reported. The opinion of the district court (Pet. App. B, 19a-34a) is reported at 320 F. Supp. 664.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1973 (Pet. App. A, 17a). A timely petition for rehearing was denied on May 22, 1973 (Pet. App. A, 18a). The petition for a writ of certiorari was filed on July 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The 1966 amendments to the Fair Labor Standards Act extended the coverage of the Act to enterprises

grossing $500,000 or more annually which have "employees engaged in commerce * * * including employees handling, selling, or otherwise working on goods that have been moved in * * * commerce by any person." The question presented is whether elevator operators in an office building complex, who participate in completing the interstate journey of mail, parcel post and freight, are "employees engaged in commerce."

STATUTE INVOLVED

The pertinent coverage provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, are set forth in the petition for a writ of certiorari (Pet. 2-3).[1]

STATEMENT

This action was brought by the Secretary of Labor to enjoin petitioner, The Wilson Building, Inc., from violating the minimum wage, overtime and recordkeeping provisions of the Fair Labor Standards Act, and to compel payment, with interest, of compensation owing under the Act to the petitioner's building maintenance personnel. Concededly, petitioner's office buildings gross more than $500,000 per year in rents from tenants. Petitioner also admits that it paid employees at rates below the statutory minimums (29 U.S.C. 206(b)) for all hours of work, including the hours in excess of the weekly maximum specified in the Act (29 U.S.C. 207(a)(2)), and did not observe the Act's recordkeeping requirements (29 U.S.C. 211(c)). Petitioner denied, however, that it was subject to the Act, claiming that it had no employees "engaged in commerce" or "in handling, selling, or

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[1] The applicable minimum wage provision for the Act is 29 U.S.C. 206(b), not 29 U.S.C. 206(a), as set forth in the petition (Pet. 3).

otherwise working on goods that have been moved in * * * commerce * * *" (19 U.S.C. 203(s)).

Both the district court and the court of appeals held that petitioner was subject to the Act, pointing to the fact that the several employees who operate the elevators in petitioner's 17-story Wilson Tower Building regularly transport mailmen and others delivering interstate mail, parcel post and freight to tenants in the building.

ARGUMENT

In carrying mailmen and others delivering interstate mail, parcel post and freight to the building's tenants, the petitioner's elevator operators were "engaged in commerce" and "in handling * * * goods that have been moved in * * * commerce * * *" (29 U.S.C. 203(s)). In consequence, petitioner is an "[e]nterprise engaged in commerce * * *," subject to the provisions of the Fair Labor Standards Act (*ibid.*).

In concluding that activities of the elevator operators extended the Act's coverage to the petitioner, the court of appeals relied on the Act's broad definition of "commerce" as "including 'trade, commerce, *transportation,* tramsmission, or communication among the several States'" (Pet. App. 8a; emphasis by the court) and on the "line of cases beginning with *Walling* v. *Jacksonville Paper Co.*," 317 U.S. 564, which ruled that goods moving from one State to another, with a known destination in the latter, remain in interstate commerce until they reach their final destination (Pet. App. 9a). "It is plain," said the court, "that the goods transported by [petitioner's] elevator operators (mail, parcel post and freight) continue to flow in interstate commerce beyond the lobby of the office buildings, where [petitioner] argues the journey technically ends, and that they do not come

to rest until delivered to the offices of the tenants" (Pet. App. 10a). Accord: *Fleming* v. *A. B. Kirschbaum Co.*, 124 F. 2d 567, 572, n. 5 (C.A. 3), affirmed *sub nom. A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517;[2] *Wirtz* v. *Columbian Mutual Life Ins. Co.*, 246 F. Supp. 198, 208 (W.D. Tenn.), affirmed, 380 F. 2d 903 (C.A. 6); *Mitchell* v. *Sunshine Department Stores, Inc.*, 292 F. 2d 645, 647-649 (C.A. 5); *Wirtz* v. *McClure*, 333 F. 2d 45 (C.A. 10); *McComb* v. *W. E. Wright Co.*, 168 F. 2d 40, 42 (C.A. 6), certiorari denied, 335 U.S. 854; *Sucrs. de A. Mayol & Co.* v. *Mitchell*, 280 F. 2d 477, 480 (C.A. 1), certiorari denied, 364 U.S. 902; *McComb* v. *Herlihy*, 161 F. 2d 568, 570-571 (C.A. 4); *Clyde* v. *Broderick*, 144 F. 2d 348, 351 (C.A. 10); *Wright* v. *Carrigg*, 275 F. 2d 448, 449 (C.A. 4); *Shultz* v. *Blaustein Industries, Inc.*, 321 F. Supp. 998 (D. Md.); *Batts* v. *Professional Building, Inc.*, 276 F. Supp. 356 (S.D. W. Va.).

The cases upon which petitioner relies, in arguing that the courts below improperly extended coverage to employees of a "local business," are, with one

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[2] Although this Court's affirmance of *Kirschbaum* discusses only the Act's "production for commerce" ground of coverage, this does not mean, as petitioner seems to suggest (Pet. 9), that the Third Circuit's holding that the elevator operators there involved "are also directly engaged in commerce" (124 F. 2d at 572) was thereby overruled or even disapproved. In fact the Court did note that the elevator operators ran "freight elevators which start and finish the interstate journeys of goods going from and coming to the tenants" (316 U.S. at 519). More recently, in the context of another Fair Labor Standards Act controversy, the Court commented upon the "teachings" and "manifold applications" of *Kirschbaum*, stating that they "may well implicate elevator operators, janitors, charwomen, security guards, secretaries and the like in every office building in a State's governmental hierarchy" (*Employees* v. *Missouri Public Health Department*, No. 71-1021, decided April 18, 1973, slip op. p. 6).

exception,[3] inapposite since they were decided before the Act's original coverage provisions were broadened by the Fair Labor Standards Amendments of 1961 and 1966. This Court has recently noted the expanded coverage of the Act in *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516-517:

> The concept of "enterprise" under the Fair Labor Standards Act came into being with the 1961 amendments, which substantially broadened the coverage of the Act. Rather then confining the protections of the Act to employees who were themselves "engaged in commerce or in the production of goods for commerce," 29 U.S.C. §§206(a), 207(a), the new amendments brought those "employed in an enterprise engaged in commerce" within the ambit of the minimum wage and maximum hours provisions.

The 1961 definition of an "enterprise engaged in commerce" referred, *inter alia*, to "any *establishment* of any such enterprise" having employees engaged in commerce and having a gross annual volume of at least $1,000,000. *Brennan* v. *Arnheim & Neely, Inc., supra*, 410

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[3] The exception is *Houchin* v. *Thompson*, 438 F. 2d 927 (C.A. 6), which petitioner claims conflicts with the decision below. In that case, the Sixth Circuit did not hold that elevator operators can never be covered by virtue of their activities in handling interstate mail and freight, but only that the employees there involved had not made the necessary showing of substantial engagement in interstate activities. Moreover, to the extent that *Houchin* resurrects the *de minimis* doctrine, it is contrary to this Court's latest statement on the point in *Maryland* v. *Wirtz*, 392 U.S. 183, 192-193, which arose under the Act's enterprise coverage provisions, that "[t]he contention that * * * the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest."

U.S. at 515, n. 2 (emphasis added). In 1966 the Act was broadened still further to require only that the "enterprise" have "employees" engaged in commerce and do a $500,000 business annually (*ibid.*).

The results of these amendments is to extend the Act's coverage to local businesses if they have some employees engaged in commerce and do a substantial annual business.[4] Thus the Act has been held to cover private country clubs (*Shultz* v. *Deane-Hill Country Club, Inc.*, 310 F. Supp. 272, 277-278 (E.D. Tenn.), affirmed *per curiam*, 433 F. 2d 1311 (C.A. 6), certiorari denied, 400 U.S. 820) and laundromats (*National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F. 2d 689 (C.A. D.C.); *Wirtz* v. *Washeterias, S.A.*, 304 F. Supp. 624 (D. Canal Zone)).

The new amendments to the Act put to rest any claim that this Court's 1945 decision in *10 East 40th Street Bldg.* v. *Callus*, 325 U.S. 578, controls here. As the court below observed, the focus of *Callus* was on the activities of the tenants of an office building, rather than the employees. But, under the amended Act, it is now clear that an office building complex is an "enterprise" covered by the Act if it is doing a large enough business and if some of its employees are "engaged in interstate commerce" (29 U.S.C. 203(r) and 203(s)). Thus, the particularized showing, in this case, that the elevator operators were contributing to

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[4] The intent to cover such "local" business is clear not only from the statutory language, but from the legislative history (S. Rep. No. 145, 87th Cong., 1st Sess., pp. 2-3, 76, 94-96; 107 Cong. Rec. 5964-5965), including, in particular, the rejection of an earlier bill which would have limited the enterprise concept of coverage to construction firms and retail or service establishments which operate in *two or more* States (107 Cong. Rec. 5873, 6088-6089, 6243).

interstate transportation—without more—settles the issue of coverage.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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